PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTORNEYS.

Disbarment

The Supreme Court of Illinois holds in *People ex rel. Deneen* v. *Gilmore,* 73 N. E. 737, that in proceedings for disbarment of an attorney the fact that respondent, after conviction in another state of embezzlement and sentenced to the state penitentiary, was pardoned by the Governor of such state did not efface the moral turpitude involved in the crime nor obliterate the stain on respondent's moral character, and consequently that the omission of an applicant for admission to the bar to advise the court that he has been convicted of a crime affecting his moral character cannot be regarded otherwise than as the reprehensible concealment of a fact which it is the duty of such applicant to disclose. See also *People ex rel.* v. *George,* 186 Ill. 122.

BANKRUPTCY.

Preference: Set-off

An interesting decision in relation to bankruptcy occurs in the case of *Western Tie and Timber Company* v. *Ben A. Brown, Trustee of the Estate of S. F. Harrison, a Bankrupt,* 25 S. C. R. 339, where the Supreme Court of the United States holds that a corporate creditor is not entitled to set off, in proving its claim against the bankrupt debtor's estate, a sum retained by it with knowledge of the debtor's insolvency, and within four months of the filing of the petition in bankruptcy, which sum was due and owing the bankrupt under an agreement by which, in paying its employees, the corporation was to deduct from their wages the amount due from such employees to the bankrupt for supplies sold them by him, and to remit to him the amount thus deducted, irrespective of any indebtedness otherwise due from him to the corporation. Compare *Libby* v. *Hopkins,* 104 U. S. 303.

BURDEN OF PROOF.

The difficult question that arises in connection with the rights of shippers where goods are sent over several connecting lines are constantly appearing in the decisions. An interesting case is *Meredith* v. *Seaboard Air Line Ry.*, 50 S. E. 1, where the Supreme Court of North Carolina decides that where goods are delivered to an initial carrier, without any special contract, to be transported to a point on the line of a connecting carrier, and there is a delay in shipment, and the goods are delivered at their destination in a damaged condition, the burden is on the initial carrier, in an action brought against it, to show that the damage did not occur while the goods were in its possession. Compare *Britnall* v. *Railroad,* 32 Vt. 665.

Connecting Carriers

CARRIERS.

In *Sprigg's Adm'r* v. *Rutland R. Co.,* 60 Atl. 143, the Supreme Court of Vermont holds that a contract for the shipment of cattle in the company of a caretaker exempting the carrier from liability in excess of an agreed valuation for damage to the cattle, whether caused by negligence or otherwise and exempting it from any liability for injury to the caretaker, is, if not altogether good, divisible in its provisions as to the cattle and the caretaker, and if one of such provisions is good it may be sustained, although the other is condemned as illegal. See *Kimball* v. *The Rutland and Burlington R. R. Co.,* 26 Vt. 247.

Divisibility of Contract

In *St. Louis Southwestern Ry. Co. of Texas* v. *White,* 86 S. W. 71, the Court of Civil Appeals of Texas decides that where plaintiff inquired of defendant's ticket agent as to the best route for his wife to take in order to reach a certain point, though the representations of the agent were not binding on the company when made in reference to matters about another road, unless he was authorized so to do, or unless such representations were made in connection with his duties, where he makes representations in relation to such other route in order to induce parties to purchase over his road, and such parties are so induced to purchase, and an injury results therefrom, the road he represents is liable therefor, and such acts being within the scope of his apparent authority, it was not neces-

Representation to Passengers

CARRIERS (Continued).

sary to allege in the complaint custom and usage of ticket agents so to do. Compare *Mitchell* v. *Zimmerman,* 4 Tex. 75.

Delay in Transportation

In *Crutcher* v. *Choctaw, O. and G. R. Co.,* 85 S. W. 768, the Supreme Court of Arkansas decides that a carrier, to be liable for special damages for delay in transportation of freight, must have had notice, before or at the time the contract was made, of the special circumstances. It is not enough that it receive such notice during the delay. See also in connection herewith *Hooke Smelting Co.* v. *Planters' Compress Co.,* 79 S. W. 1052.

Pullman Conductor

The Court of Civil Appeals of Texas decides in *Blake* v. *Kansas City Southern Ry. Co.,* 85 S. W. 430, that though the conductor of a Pullman car which forms part of a railway train is, in his dealings with the passengers, to be regarded as a servant of the railroad, making it responsible for his acts as though he were directly employed by it, this is not so as respects his dealings with a trespasser on the train and on the Pullman car. This decision forms an important exception to the general rule. See *Thorpe* v. *Railway Company,* 76 N. Y. 406.

CONSTITUTIONAL LAW.

Compulsory Vaccination

It is satisfactory to have the question of the validity of state laws requiring vaccination established by the Supreme Court of the United States, though there seems to have been practical unanimity in the decisions of the state courts upon this subject. It is held by the Supreme Court of the United States in *Henning Jacobson* v. *Commonwealth of Massachusetts,* 25 S. C. R. 358, that the personal liberty secured by the Fourteenth Amendment to the Federal Constitution against state deprivation is not infringed by a state law authorizing compulsory vaccination by local boards of health when deemed necessary for the public health or safety, under which, as construed by the highest state court, vaccination may be required of all the

CONSTITUTIONAL LAW (Continued).

inhabitants of a city where smallpox is prevalent and increasing. See also *Blue* v. *Beach,* 155 Ind. 121, 50 L. R. A. 64.

Ex Post Facto Laws

An act of North Dakota passed in 1903 substituted, in cases of convictions of murder in the first degree, close confinement in the penitentiary for not less than six nor more than nine months after judgment and before execution of the death penalty, in lieu of confinement in the county jail for not less than three nor more than six months, and changed the place of execution from the county jail to the penitentiary. In *John Rooney* v. *State of North Dakota,* 25 S. C. R. 264, the Supreme Court of the United States decides that this statute is not *ex post facto* as applied to a person convicted of that crime prior to its passage, on the ground that it did not alter the existing situation of the criminal to his material disadvantage. Compare *In re Medley,* 134 U. S. 160.

Interstate Commerce

The Court of Civil Appeals of Texas decides in *Houston and T. C. R. Co.* v. *Everett,* 86 S. W. 17, that the Legislature may prescribe a penalty for the failure of railroads to furnish cars for the shipment of freight, although the shipment in contemplation is to be an interstate shipment. Compare *Railway Co.* v. *Mayes,* 84 S. W. 53.

Due Process of Law

The Supreme Court of Indiana decides in *Old Wayne Mut. Life Ass'n of Indianapolis* v. *McDonough,* 73 N. E. 703, that a statute of Pennsylvania requiring foreign insurance companies wishing to do business in the state to file with the Insurance Commissioner a stipulation that process affecting the company, served on the Insurance Commissioner, or the party designated by him, or the agent specified by the company, shall have the same effect as if served personally on the company, does not deny a foreign insurance company due process of law, within the inhibition of the Fourteenth Amendment of the Federal Constitution, and is valid. Compare *Railroad* v. *Harris,* 12 Wall. 65.

CONTRACTS.

Public Policy

The Court of Appeals of Maryland decides in *Baltimore Humane Impartial Soc. and Aged Women's and Aged Men's Homes* v. *Pierce,* 60 Atl. 277, that a contract executed on entrance into an old man's home, whereby any property which the inmate may receive in the future is to become the property of the home, is unenforceable, as against public policy. Compare *German Aged People's Home* v. *Hammerbacker,* 64 Md. 495.

CORPORATIONS.

Powers of Directors

In *Rascover* v. *American Linseed Co.,* 135 Fed. 341, the United States Circuit Court of Appeals, Second Circuit, decides that the directors of a corporation under their general and ordinary powers have authority to incur expense in notifying the stockholders of a proposed scheme of consolidation, or for exchanging the stock of the corporation for that of another, as a matter of which it is their duty to promptly and fully advise all stockholders not only in their own interest, but in that of the corporation; and, having such authority, the manner of giving such notice and the expense to be incurred therefor is a matter within their discretion, and the corporation is bound by a contract made by them for the publication of notices to stockholders setting forth the scheme, whether it is consummated or not.

DEATH.

Action: Damages

The questions connected with the statutory right to sue for the death of a relative as provided in such statutes give occasion for many interesting decisions. A recent and important one is the case of *International and G. N. Ry. Co.* v. *Boykin,* 85 S. W. 1163, where the Court of Civil Appeals of Texas decides that in an action by a husband for the death of his wife evidence that he had married again is inadmissible. Compare *G. C. and S. F. Ry.* v. *Younger,* 90 Tex. 387.

ELECTIONS.

Voting Machines

Interesting constitutional questions have been raised as to the legality of the use of the modern voting machine under the provisions for voting by ballot. In *City of Detroit* v. *Board of Inspectors of Election for Fourth Election Dist. of Second Ward of City of Detroit,*

ELECTIONS (Continued).

102 N. W. 1029, the Supreme Court of Michigan is confronted by this question, and holds that a constitutional provision requiring all votes except for township officers to be given by ballot merely declares the policy of the state to assure to the elector a secret, as distinguished from an open vote, and does not permanently establish a particular mode of voting and is not infringed by a statute authorizing the use of voting machines, and requiring all voting by machine to be by a secret vote. Compare *In re Voting Machine,* 19 R. I. 729, 36 L. R. A. 547, and opinion of the justices, 178 Mass. 605.

EVIDENCE.

Physical Examination

In *Houston Electric Co.* v. *Lawson,* 85 S. W. 459, the Court of Civil Appeals of Texas decides that where, in an action for injuries to an infant, its father claimed that it was seriously injured, but refused to permit an examination by a committee of physicians to be appointed by the court, and the child was not brought into court during the trial, evidence of such refusal was admissible as tending to discredit the father's claim as to the extent of the injuries. Compare *Ry. Co.* v. *Cluck,* 77 S. W. 403.

Accomplice

The rules referring to the care to be exercised in accepting the testimony of an accomplice give rise to an interesting decision in *Stone* v. *State,* 85 S. W. 808, where it is held by the Court of Criminal Appeals of Texas that an inmate of a disorderly house cannot be prosecuted under an indictment for keeping a disorderly house, and hence, in a prosecution under such an indictment, the evidence of an inmate is not that of an accomplice.

Wounds on Accused

In *State* v. *Miller,* 60 Atl. 202, the Court of Errors and Appeals of New Jersey decides that it was not erroneous to permit the physician of the jail, in which the accused was confined, to testify to wounds observed by him on the backs of the hands of the accused, although he also testified that he had the accused removed to a room in another part of the jail and divested of his clothing. The observation made by the witness of the

EVIDENCE (Continued).

wounds on the hands, and testified to by him, was in no sense a compelling of the accused to be a witness against himself. If the removal of the clothes had been forcible, and the wounds had been thus exposed, it seems that the evidence of their character and appearance would not have been objectionable. See *State* v. *Ah Chuey,* 14 Nev. 79.

FULL FAITH AND CREDIT.

In *Isaac N. E. Allen* v. *Allegheny Company,* 25 S. C. R. 311, the Supreme Court of the United States decides that whether or not a corporate contract, entered into in contravention of the statutes regulating foreign corporations, was, under the proper construction of such statutes, *ipso facto* void, and, therefore, unenforceable in the courts of another state, does not present a question under the full faith and credit clause of the Federal Constitution which will sustain the exercise by the Federal Supreme Court of its appellate jurisdiction over state courts.

Statutes of Another State

GIFTS.

In re Klenke's Estate, 60 Atl. 166, the Supreme Court of Pennsylvania decides that where a husband deposits with his wife's earnings certain money of his own in a bank in his wife's name, and the wife subsequently makes additional deposits, and the husband never claims the money, the presumption is that it was a gift to the wife. It is further held that where a deposit in a bank stands in the joint names of a husband and his wife, they hold by the entireties, and, on the death of either, the survivor takes the whole. See also *Parry's Estate,* 188 Penna. 33, 49 L. R. A. 444.

Presumption: Deposit in Bank

INJUNCTION.

In *Nerlien* v. *Village of Brooten,* 102 N. W. 867, the Supreme Court of Minnesota decides that the use of a municipal building as a village hall for private commercial purposes is unauthorized, and, when objected to by a taxpayer or person injuriously affected through the business transacted, may be restrained by injunction. Applying this principle it is held that where

Use of Municipal Buildings

INJUNCTION (Continued).

the village marshal is permitted by the municipality to spend a portion of his time in selling the vendible articles of a merchant therein, and is to some extent paid out of the public funds, the municipality may be restrained by injunction from continuing such diversion of the public funds. Compare *Scofield* v. *Eighth School District,* 27 Conn. 499.

INTERSTATE COMMERCE.

The St. Louis Court of Appeals of Missouri decides in *State* v. *Seagraves,* 85 S. W. 925, that the carrying of a pleasure party on a steamboat is not interstate commerce, although the boat may touch the shores of different states. Compare with this decision *Dugan* v. *State,* 125 Ind. 130, 9 L. R. A. 321.

What Constitutes

JURISDICTION OF FEDERAL COURTS.

In *Stanwood* v. *Wishard,* 134 Fed. 959, the United States Circuit Court (S. D. Iowa, Central Division) decides that in a suit brought in a Federal court by creditors of an insolvent corporation on behalf of themselves and all other creditors similarly situated to recover property alleged to belong to the corporation, but to have been fraudulently acquired by certain of the defendants, where the claims of some of the complainants exceed $2000, others may join although their claims are less than that amount. See also note to *Auer* v. *Lombard,* 19 C. C. A. 75.

Amount in Controversy

The Supreme Court of the United States decides in *Bertha Doctor* v. *John Harrington,* 25 S. C. R. 355, that the fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the parties to a cause, for the purpose of determining the jurisdiction of a Federal circuit court, invoked on the ground of diversity of citizenship, that such corporation be grouped on the side of complainants, where the bill alleges that the corporation is under a control antagonistic to complainants, and is made to act in a way detrimental to their rights. Compare with this decision *Detroit* v. *Deen,* 106 U. S. 537.

Diversity of Citizenship

LEASE.

Construction: Rights of Parties

In *Fuller* v. *Rose,* 85 S. W. 931, the Kansas City Court of Appeals of Missouri decides that where, by lease of rooms in an office building, the tenants were denied the use of any of the walls of the building for advertising their business, they being restricted to the use of the windows for that purpose, the tenants cannot, without any claim for actual injury to their business, restrain the landlord from painting advertisements on the outer walls merely on the ground that the advertisements offend their æsthetic taste and dim the lustre of their own signs painted on the windows. Compare with this decision the case of *Bailey* v. *Culver,* 84 Mo. 540.

MUNICIPAL CORPORATIONS.

Improvements: Retaining Wall

The Supreme Court of Pennsylvania decides *In re Perrysville Avenue,* 60 Atl. 160, that where a street is built on a side of a steep hill, and a retaining wall is necessary for its support, abutting owners who knew of the building of the wall, and most of whom requested the same, are liable for assessments for the benefits arising therefrom, though the wall was not actually built on their land. Compare *Western Penna. Ry. Co.* v. *Allegheny,* 92 Penna. 100.

Police Power

In *City of Richmond* v. *Caruthers,* 50 S. E. 265, the Supreme Court of Appeals of Virginia decides that dead domestic animals are not *per se* nuisances, and cannot be made such by legislative declaration, and consequently that an ordinance which, immediately upon the death of a domestic animal, and before it becomes a nuisance or dangerous to public health, deprives the owner of the animal of his property in the carcass, and invests it in a public contractor for the removal of such carcasses, provides for the taking of private property without due process of law, within the inhibition of the Fourteenth Amendment to the Federal Constitution, and is, therefore, void. On the other hand, it is said that a city council possesses ample power to enact and enforce, in the interest of public health and safety, such reasonable ordinances as may be necessary with respect to the speedy and orderly removal of dead ani-

MUNICIPAL CORPORATIONS (Continued).

mals to places of safety, by the owner primarily, or, upon his default, by such other agency as it may prescribe. See also *Underwood* v. *Green,* 42 N. Y. 140.

MURDER.

In *Johnson* v. *State,* 38 S. 182, the Supreme Court of Alabama decides that where an officer was endeavoring to arrest one who by reason of his insanity was incapable of committing murder, and defendant freed the lunatic's hand from the grasp of the officer, thereby enabling the lunatic to shoot the officer, defendant was criminally responsible for the lunatic's act. See also 1 East's P. C., c. 5, sec. 14, page 228.

Shooting by Lunatic

NEGLIGENCE.

The Supreme Court of Pennsylvania decides in *Kohn* v. *May,* 60 Atl. 301, that where plaintiff, an upper tenant in a building, was injured while escaping through a window during a fire by his inability to escape otherwise because of the obstruction of the stairway by the lower tenant, such obstruction was the proximate cause of his injury. Compare *Sewell* v. *Moore,* 166 Penna. 570.

Proximate Cause

POSTMASTERS.

The Supreme Court of Arizona decides in *United States* v. *Griswold,* 80 Pac. 317, that under the bond of a postmaster, conditioned that he will faithfully discharge all the duties and trusts imposed on him by law or the rules and regulations of the Post Office Department, and Postal Laws and Regulations, Sec. 1051, providing that the postmaster will be held accountable for all registered matter coming into his office, he is liable for a registered package delivered to him; it being afterwards stolen, though without negligence on his part. Compare with this decision the case of *People* v. *Faulkner,* 107 N. Y. 477.

Liability on Bond

PRESUMPTIONS.

Undue Influence

The Supreme Court of Vermont holds *In re Cowdry's Will,* 60 Atl. 141, that the presumption of undue influence which the law raises where a guardian is a beneficiary of his ward's will, does more than to take the burden of proof from the contestants of the will and to place it upon the guardian, and establishes *prima facie* the existence of such influence so as to defeat the will, unless and until it is overcome by counter proof.

RAILROADS.

Condemnation: Dwelling Houses

The Supreme Court of Pennsylvania decides in *Snyder* v. *Baltimore and O. R. Co.*, 60 Atl. 151, that the Act of March 17, 1869 (P. L. 12), conferring on certain railroads previously incorporated the right to straighten, widen, and otherwise improve their lines of railroad, removed from railroad companies, when the necessity of enlargement arose, the restriction in the general railroad act of 1849 as to dwelling houses, so as to authorize a railroad company, in widening its roadbed for additional tracks, to condemn a dwelling house. Compare with this decision the case of *Dryden* v. *Railway Co.*, 208 Pa. 316.

RIGHT OF PRIVACY.

Publication of Picture

The decision of the Court of Appeals of New York in *Robertson* v. *Rochester Folding Box Co.,* 171 N. Y. 540, in which the right of a person to enjoin the publication of her picture for advertising purposes and recover damages was denied will be remembered by the readers of the LAW REGISTER and, it may be recalled, regret was expressed at the time in these columns over the decision. It is gratifying to find a contrary holding by the Supreme Court of Georgia in *Pavesich* v. *New England Life Ins. Co.,* 50 S. E. 68, in which case the New York decision is carefully and fully considered as well as other decisions. In fact, the case presents a very thorough review of the subject of the right of privacy and holds in a decision in which all the justices concur that the publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is repro-

RIGHT OF PRIVACY (Continued).

duced, and entitles him to recover, without proof of special damage. It will be remembered that the New York decision was by a divided court.

SECURITY DEED.

In *Benedict* v. *Gammon Theological Seminary,* 50 S. E. 162, the Supreme Court of Georgia decides that where one borrows money from another, and makes him a good deed to secure the debt, and the lender sues the borrower upon his failure to pay the debt at maturity, and obtains a judgment against him, before the execution is levied upon the land given as security the lender must reconvey the land to the borrower, and have the deed of reconveyance recorded. If levy is made without such reconveyance, and the land sold by the sheriff by virtue of the execution, such sale is illegal and absolutely void.

Levy of Execution Sale

SPECIFIC PERFORMANCE.

Against the dissent of four judges the Court of Errors and Appeals of New Jersey decides in *Charlton* v. *Columbia Real Estate Co.,* 60 Atl. 192, that a signed but undelivered lease may be given in evidence to prove an agreement upon the details of a lease pursuant to one of the terms of a previously signed memorandum in writing of an oral agreement for a lease; and if said previous memorandum of agreement for a lease and the signed but undelivered lease, taken together, show a completed agreement upon the terms of a lease, the statute of frauds is satisfied and specific performance may be decreed. Compare *Ryan* v. *United States,* 136 U. S. 68.

Contract to Lease

TELEGRAMS.

The growing tendency of courts to allow damages for mental anguish in consequence of a delay in delivery of telegrams furnishes an increasing field of litigation. A new decision in reference to this matter appears in *Western Union Telegraph Co.* v. *Reid,* 85 S. W. 1171, where the Court of Appeals of Kentucky decides that mental anguish of a father in beholding the sufferings of his

Delay in Delivery

TELEGRAMS (Continued).

child during the period that a telegraph company negligently delays delivering a message to a physician announcing the nature of the child's trouble, and requesting his immediate presence with surgical instruments, is not a proper element of recovery against the telegraph company. See also *Black* v. *Railway Co.*, 10 La. Ann. 33.

TRUSTEES.

Conduct of Business

The Supreme Court of Pennsylvania holds in *Prinz* v. *Lucas*, 60 Atl. 309, that where trustees are given power under the deed of trust to conduct a business as if they were absolute owners of the trust property, the estate, and not the trustees, is liable for the negligent act of a driver of a team employed in the business.

WILLS.

End of Will

An interesting question arising out of the usual statutory provision that a will must be signed at the end thereof appears in the case of *Irwin* v. *Jacques*, 73 N. E. 683. It is there held by the Supreme Court of Ohio that where, in the trial of such issue, the original will is in evidence, and shows the body of it to be written on horizontal lines of several pages of foolscap or legal cap paper, so that all its items and provisions are in consecutive order to the end on the last page, and under which the testator's signature appears; and it also shows that there is written in the margin of the last page to the left of and separated from the body of the instrument a dispositive clause, extending lengthwise of the page from near the bottom to near the top thereof, and in no manner connected with the body of the instrument by any words, mark, or character as a reference to indicate where the marginal matter is to be read in relation to the other provisions; and it is established by the testimony that the marginal matter was written after all the other provisions at the request of the testator and before he attached his signature under the body of the will—then such will is not signed at its end, as required by statute, and it is invalid for that reason. See also *Baker* v. *Baker*, 51 Ohio 217.

WILLS (Continued).

The Court of Errors and Appeals of New Jersey decides in *Tuerk* v. *Schueler,* 60 Atl. 357, that where lands are devised to A in language indeterminate as to the quantity of the estate, and an express power is at the same time given to A to dispose of the same without qualification, such devise passes the fee to A, and a devise over of what is left at A's death to B is void. Compare *Downey* v. *Borden,* 36 N. J. Law, 460.

Construction

The Supreme Court of Illinois decides in *Gerbrich* v. *Freitag,* 73 N. E. 338, that the fact that husband and wife devise their property reciprocally to each other by a joint will does not invalidate the same, unless its provisions are such that the disposition of the property is suspended after the death of one until the death of the other, so that the will cannot be executed as the separate will of the deceased.

Joint Wills

WITNESSES.

The Supreme Court of Michigan decides in *Wilcox* v. *Wilcox,* 102 N. W. 954, that a widow who presents a claim against her deceased husband's estate for medical attendance, nursing, and other incidental expenses may testify to items concerning which she shows that deceased had no knowledge, but may not testify to items once within the knowledge of deceased.

Transactions with Decedents